



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Updates in Federal Agency Adjudication

July 2023

ACUS is an independent federal agency within the executive branch that develops recommendations to improve administrative processes, including adjudication, and arranges for the interchange of information to carry out its mission. The ACUS Office of the Chairman issues monthly *Updates* to share adjudication-related developments with agencies, Congress, and the public. For additional resources, visit www.acus.gov/adjudication.

This resource is for informational purposes only. Except as noted, these updates do not represent the position of ACUS or the federal government. New developments, feedback, and corrections are welcome at info@acus.gov.

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ADMINISTRATIVE REVIEW

[Revised Interim Director Review Process \(USPTO, July 24\)](#). The United States Patent and Trademark Office updated its procedures for the interim Director Review (DR) of Patent Trial and Appeal Board (PTAB) decisions by expanding the process to permit parties to request DR and providing updated guidance on the type of issues considered in DR, among other changes, providing the option for the Director to delegate review to a new independent panel, and creating a new Appeals Review Panel for review of PTAB ex parte, reexamination, and reissue appeal decisions. These revised processes replace the Precedential Opinion Panel process.



[Bureau of Safety and Environmental Enforcement Appeal Criteria](#) (DOI, July 27). The Department of the Interior published its Semiannual Regulatory Agenda, which includes a proposed rulemaking it expects to issue that would clarify the Bureau of Safety and Environmental Enforcement’s surety bond requirements when filing an appeal of outer continental shelf civil penalties with the Interior Board of Land Appeals (IBLA).

APPOINTMENTS AND NOMINATIONS

[Nominee for Commissioner of SSA Announced](#) (White House, July 26). President Biden announced his intent to nominate former Maryland Governor Martin O’Malley as Commissioner of the Social Security Administration.

CONGRESSIONAL AFFAIRS

[Congressional Constituent Service Inquiries](#) (ACUS). ACUS is examining how agencies receive, process, and respond to congressional inquiries made on behalf of constituents who need assistance accessing federal programs or navigating adjudicative and other similar administrative processes. The project will identify best practices for agencies to promote quality, efficiency, and timeliness in agency procedures for responding to such inquiries. Among other topics, the project will address the body of law governing agency responses to congressional constituent service inquiries; the extent to which agencies have developed procedures for receiving, processing, and responding to such inquiries; and the scope, content, internal dissemination, and public availability of these procedures where adopted. Sean Kealey (Boston University) is serving as a consultant.

CONSTITUTIONALITY

[Burgess v. FDIC](#) (Fifth Circuit, July 17). The Fifth Circuit granted a stay pending the U.S. Supreme Court’s decision in [SEC v. Jarkesy](#).

ENFORCEMENT

[Adjustments to Certain Civil Monetary Penalties](#) (SBA, August 1). The Small Business Administration adjusted for inflation the amount of civil monetary penalties authorized by the Small Business Act, the Small Business Investment Act of 1958 (SBI Act), the Program Fraud Civil Remedies Act, and the Byrd Amendment to the Federal Regulation of Lobbying Act.



MANAGEMENT AND OPERATIONS

Racial and Ethnic Disparities in VA Disability Benefits (GAO, July 26). The Government Accountability Office recommended that the Department of Veterans Affairs conduct a comprehensive assessment of disability compensation to identify the root causes that could contribute to racial and ethnic disparities in approval rates.

USCIS User Fees (DHS, July 27). In its unified regulatory agenda, the Department of Homeland Security included information about a final rule it intends to publish that will establish new fees for immigration and naturalization benefit requests that are charged by the U.S. Citizenship and Immigration Services.

Improving Timeliness in Agency Adjudication (ACUS). ACUS launched a project to survey strategies—including procedural, technological, personnel, and other reforms—that agencies have used or might use to address backlogs or delays in administrative adjudication. Based on this survey, it will identify best practices to help agencies devise plans to promote timeliness in administrative adjudication, in accord with principles of fairness, accuracy, and efficiency. The project will also consider potential legislative reforms, if warranted. Jeremy Graboyes and Jennifer Selin, both of ACUS, are serving as researchers.

Identifying and Reducing Burdens in Administrative Processes (ACUS). ACUS is undertaking a project to recommend best practices, such as public engagement and data analysis, that agencies can use to identify unnecessary burdens that members of the public face when they engage with administrative programs or participate in administrative processes, including adjudication. It will also recommend strategies agencies can use to reduce unnecessary burdens, such as streamlining processes and digitizing services. Pamela Herd (Georgetown), Donald Moynihan (Georgetown), and Amy Widman (Rutgers) are serving as consultants.

User Fees (ACUS). ACUS is undertaking a project that will recommend best practices for agencies—and Congress, if warranted—to consider in designing and implementing user fees in administrative programs (including application fees and filing fees in agency adjudications). It will examine, among other topics, how Congress and agencies determine when user fees are appropriate; how agencies determine fair and reasonable user fees for specific programs; how they engage with the public in determining user fees; and how often they review their user fee programs. Erika Lietzan (Missouri Law) is serving as a consultant.



[VA Management of Disability Exam Workload \(GAO, July 27\)](#). The Government Accountability Office provided testimony before the Subcommittee on Disability Assistance and Memorial Affairs summarizing its findings related to the Department of Veterans Affairs' efforts to manage the disability examination workload and demand.

[Projected Impact of Immigration Judge Hiring on Immigration Court Backlog \(CRS, July 28\)](#). The Congressional Research Service issued a report outlining trends in the Executive Office for Immigration Review's caseloads, the rate of case completions, and immigration judge staffing levels and hiring efforts with projections of the impact of different hiring scenarios over the next 10 years on the backlog of pending cases.

MILESTONES

[Board of Veterans Appeals Celebrates 90th Anniversary \(VA, July 19\)](#). U.S. Secretary of Veterans Affairs Denis McDonough commemorated the date and the history of the Board.

PROCEDURAL RULES

[Implementing Procedural Provisions of the National Environmental Policy Act \(CEQ, July 31\)](#). The Council on Environmental Quality issued a notice of proposed rulemaking to revise its regulations for implementing the procedural provisions of the National Environmental Policy Act (NEPA), partly in response to the Fiscal Responsibility Act of 2023, which included amendments to NEPA.

[Copyright Claims Board Procedures \(USCO, July 27 and 31\)](#). The U.S. Copyright Office adopted as [final](#) a May 3, 2023, proposed rule governing the filing of agreement-based counterclaims and related discovery requirements. The Copyright Office also adopted as [final](#) a December 19, 2022, interim rule governing district court referrals, proof of service forms, default proceedings, and the appearance of law student representatives before the Copyright Claims Board.

[Best Practices for Adjudication Not Involving an Evidentiary Hearing \(ACUS\)](#). ACUS launched a project to examine the wide range of procedures that agencies use when adjudicating cases in programs in which there is no legally required opportunity for an evidentiary hearing. It will offer a set of broadly applicable best practices that account for the diversity of matters that agencies decide through truly informal adjudication and promote fairness, accuracy, and efficiency. Michael Asimow (UCLA, Santa Clara) is serving as consultant.



Public Participation in Agency Adjudication (ACUS). ACUS launched a project to identify best practices for public participation in agency adjudicative proceedings. Among other topics, the project will address circumstances in which public participation may be appropriate; options for public participation (e.g., written comments, oral presentations, intervention, amicus briefing); methods for facilitating public participation (e.g., notice, managing oral and written comments, technology use); and agencies' use of information obtained through public engagement efforts.

REFERENCE GUIDES AND TRAINING

Guidance for Assessing Allegations of Statelessness (DHS, Aug. 1). The U.S. Citizenship and Immigration Services issued new guidance to assist officers when assessing an individual's potential statelessness, including updating training documents and procedures.

REPRESENTATION

Authorized Communication with a Supervised Paralegal (USCIS, July 27). The U.S. Citizenship and Immigration Services published a proposed rule that would revise its Notice of Entry of Appearance of Attorney or Accredited Representative form to allow for the naming of a supervised paralegal who would be authorized to communicate with USCIS in specific circumstances.

Revised Rules on Representing Others in Patent Cases and Trademark Matters (USPTO, July 17). The United States Patent and Trademark Office amended its rules of practice in patent cases and the rules regarding the representation of others before the USPTO to better protect the public and improve compliance with USPTO requirements.

Model Rules of Representative Conduct (ACUS). Following the adoption of [Recommendation 2021-9, Regulation of Representatives in Agency Adjudicative Proceedings](#), Chair Fois has convened a working group of public- and private-sector representatives to develop model rules of representative conduct. The model rules will help federal agencies amend or develop their own rules consistent with the best practices identified in Recommendation 2021-9.

Changes to Rules on Representation and Direct Fee Payment (SSA, August 4). The Social Security Administration issued a proposed rulemaking that would



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allow the agency to issue fee payments to entities, as required by the First Circuit's decision in [*Marasco & Nesselbush, LLP v. Collins*](#), by permitting individual representatives to assign their right to receive direct payment of an authorized fee to an entity on each claim. The proposed revisions would also require use of SSA's prescribed form for appointing a representative and require all representatives to sign the form.

TECHNOLOGY

[**Email Service of Documents**](#) (FLRA, July 10). The Federal Labor Relations Authority implemented an interim final rule amending its regulations to recognize email transmission as an official method of service of documents issued by the FLRA's Office of Case Intake and Publication in cases pending before the FLRA's decisional component and allow parties using the FLRA's electronic filing system to voluntarily request email service in individual cases.

[**Online Portal for Electronic Submission of Evidence and Forms**](#) (SSA, July 10). The Social Security Administration published operational guidance about the limited first release of a new online application called "Upload Documents" that allows individuals to submit evidence and forms electronically.

TRANSPARENCY

[**Improving Transparency in FEMA Transit Security Grant Program Decisions**](#) (GAO, July 26). The Government Accountability Office issued a report finding that FEMA's award process for security improvement grants "was consistent with some relevant federal grant requirements, [but] did not meet other requirements for transparency of award decisions."